Central Law Journal

St. Louis, September 20, 1923

EFFECT OF PROVISION IN AUTOMOBILE INSURANCE POLICY FOR APPRAISAL OF DAMAGES

In the case of Williams v. Hamilton Fire Ins. Co. (118 Misc. 799, 194 N. Y. Supp. 798), the plaintiff secured judgment upon a policy insuring her automobile against damages from collision. Upon the trial defendant conceded its liability, contested only the amount of the damages, claiming that the plaintiff's damages could be only the sums fixed by the appraisers. There had been two collisions, and hence two awards. The trial court held against the defendant's contention, and the plaintiff recovered a much larger sum than the amounts fixed by the appraisals.

The policy provided that before any recovery could be had thereunder, any disagreement as to the amount of loss or damage must be determined by competent and disinterested appraisers, and also that an appraisal should be had only when required. The complaint did not allege any appraisal, but the answer pleaded that there had been appraisals and the damages fixed at a sum stated. At the trial the defendant proved that the parties had entered into an agreement by which an appraiser chosen by each of them and an umpire were appointed under the policy, and that two of them had signed the awards. It was held that the judgment must be reduced to the amount of the awards. It was also held that under the provisions of the policy an appraisal was not a condition precedent to the plaintiff's right of recovery.

The state code governing submissions to arbitrators was not applicable in this case as the provision in the policy was not one calling for arbitration, since it did not authorize the passing upon the question of liability. Hence, the award was not invalid because the appraisers were not sworn nor the proceedings conducted in accordance with the code provisions.

It has been frequently decided that an agreement to submit to the decision of others a question involving only calculation or appraisement or the fixing of values, and the like, or something ministerial in character, does not constitute an arbitration under the strict rules of the common law. The distinction between the submission of such a question and one involving judicial functions is of vital importance, because the latter may be revoked at common law, while the former cannot be (Toledo S. S. Co. v. Zenith Transp. Co., 184 Fed. 391).

When the question of the liability of the company under the policy, and every other question is reserved, and the only submission provided for is an appraisal of the property at and after the time of loss or damage to determine the single question of the amount of the loss, it would seem that the agreement is for an appraisement and not an arbitration (Insurance Co. v. Ries, 80 Ohio St. 272).

This question is very well settled in New York, where it is held that a stipulation submitting the question of the amount of damage, but not the question of liability, to appraisers, is not for an arbitration, and the appraisers are not required to take an oath (Turner v. New York Central & H. R. R. Co., 74 Misc. 524). "The appraisement and estimate under the New York standard policy of fire insurance is not the same proceeding as an arbitration and award at common law or under the Code." (Strome v. London Assurance Corp., 20 App. Div. 571.)

The distinction in question is stated in a general rule in 5 C. J. 17, as follows:

> "Technically, to constitute a valid common law award, it is necessary that there should be a submission, by the parties, of an existing matter of difference,

for the purpose of concluding the parties as to the entire subject matter in issue between them, as distinguished from a submission for the ascertainment of a single fact, or the settlement of a particular question in the chain of evidence constituting a mere appraisement, valuation, or reference not designed to terminate the whole controversy between the parties, which proceeding is said not to be an arbitration."

In the case first mentioned the Court said, in regard to the plaintiff's contention that she still had the right after the appraisement to sue for the amount of damages she claimed to have sustained: "To hold as plaintiff argues would be to constitute the appraisal an empty ceremony. It would mean that the awards were not to be binding and that no purpose could be accomplished by them. Plaintiff says the appraisals were to be informal for the purpose of seeing if the parties could not get together on a settlement or compromise. But the policy says that the appraisal shall *determine* the amount of the damage. It is not merely to be informed, but to settle the amount of the damages."

QUESTIONING THE JUDGE

Aunt Jinny, a Carolina negress, was a great advocate of the rod as a help in child-rearing. As a result of an unmerciful beating which she gave her youngest and 'erneriest," she was brought into court one day by outraged neighbors.

The judge, after giving her a severe lecture, asked if she had anything to say.

"Jest one thing, jedge," she replied. "I wants to ax you a question. Was you ever the parient of a perfectly wuthless cullud child?"—Everybody's Magazine.

SCRATCHED

Citizen: "Your honor, I'm too sick to do jury duty; I've got a bad case of the itch."

Judge (to clerk): "Scratch this man out."—Briefs.

NOTES OF IMPORTANT DECISIONS

ANTICIPATORY BREACH OF CONTRACT.—In Daniels v. Newton (114 Mass. 530) the Supreme Judicial Court of Massachusetts declared that a renunciation of an executory contract by declarations or inconsistent conduct before the time of performance cannot, of itself, constitute a present violation of any legal rights of the other party or confer upon the other party a present right of action. "The true rule seems to be that in order to charge one in damages for breach of an executory personal contract the other party must show a refusal or neglect to perform at a time when and under conditions such that he is or might be entitled to require performance" (Frazier v. Cushman, 12 Mass. 227; Carpenter v. Holcomb, 105 Mass. 280).

This undoubtedly was the interpretation of the English common law in all the earlier decisions (Phillpotts v. Evans, 5 M. & W., 475; Ripley v. McClure, 4 Exch. 345; Lovelock v. Franklyn, 8 Q. B. 371).

In the case of Hochster v. De La Tour, however, decided by the Queen's Bench in 1853 (2 Ellis & Blackburn, 678), it was held that an action will at once lie where the one party to a contract of employment gives notice of his intended future breach thereof, and in Frost v. Knight, decided by the Exchequer Chamber in 1872 (Law Rep., 7 Exch. 111), the doctrine was extended to a breach by anticipation of an agreement to marry.

On principle the doctrine of anticipatory breach of contract to us seems unsound.

In Massachusetts, as seen from the cases cited *supra*, the principle is not recognized in any way whatever.

In the case of Tirrell v. Anderson (138 Northeastern Reporter, 569, Advance Sheets of April 17, 1923) the Massachusetts Supreme Judicial Court again holds that renunciation or repudiation of an executory contract before the day of performance ordinarily gives no immediate right of action, and it was held further that the measure of damages for breach of such a contract must be determined as of the day of non-performance and not as of the day of the earlier renunciation of the contract.

Writing through Mr. Justice Pierce the Court said as follows:

"In this commonwealth the renunciation or repudiation of a contract before the day of performance ordinarily is not such a breach of obligation as gives an immediate right of action. In the case at bar the dis-

ablement of the defendant to perform at his place of manufacture did not necessarily preclude his performance elsewhere within a time which the jury could find was a reasonable time for the performance of his contract (Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384; Deane v. Caldwell, 127 Mass. 242; P. [P.] Emory Mfg. Co. v. Solomon, 178 Mass. 582, 60 N. E. 377; Martin v. Meles, 179 Mass. 114, 60 N. E. 397; Porter v. Am. Legion of Honor, 183 Mass. 326, 328, 67 N. E. 238). It is apparent that the measure of damage should have been determined as of the day of non-performance and not, as they were, as of the day of the renunciation of the contract (P. P. Emory Mfg. Co. v. Solomon, *supra*)."

Even in the jurisdictions where the doctrine of anticipatory breach of contract obtains at all, the rule is usually applied only to contracts of a special character and with much caution. It is not extended to promissory notes or to mortgages. A mortgagor cannot make his mortgage due before the law day by repudiating it in advance If the maker of a promissory note given for borrowed money and due one year after date notifies the holder the next day that he repudiates it and will not pay it, the holder cannot sue at once (see Benecke v. Haebler, 38 A. D. 344, aff'd 166 N. Y. 631; Roehm v. Horst, 178 U. S. 1, 17, per Mr. Chief Justice Fuller.

In New York the anticipatory breach doctrine seems to be limited to three classes of cases: (1) Contracts for personal services (Howard v. Daly, 61 N. Y. 362, following Hochster v. De la Tour, *supra*); (2) contracts to marry (Burtis v. Thompson, 42 N. Y. 246, following Frost v. Knight, *supra*); (3) contracts for the manufacture or sale of goods, wares or merchandise (Nichols v. Scranton Steel Co., 137 N. Y. 471; Windmuller v. Pope, 1077 N. Y. 674).

The Court of Appeals firmly refused to extend the doctrine to actions brought upon life insurance policies (Kelly v. Security Mutual Life Ins. Co., 186 N. Y. 16; Langan v. Supreme Council, 174 N. Y. 266; see also Wester v. Casein Co. of America, 206 N. Y. 506).

In this department the learned Appellate Division has recently indicated also its aversion to the extension of the doctrine, holding, in effect, that while the principle has been adopted in this state it is to be applied with great circumspection (Werner v. Werner, 169 A. D. 9).

It seems very clear from the trend of the recent cases that the doctrine of anticipatory breach of contract is an anomaly which has found its way into English and American law and is now so well settled in certain jurisdictions where it obtains that it cannot be overruled without legislative intervention, but that nevertheless the courts, even in such states, regard the principle as one to be "applied with caution" (Kelly v. Security Mutual Life Ins. Co., *supra*, per Vann, J.).—N. Y. Law Journal, May 7, 1923.

CORPORATIONS AS CITIZENS AND RESIDENTS.—The following extract from the opinion of the Supreme Court of Illinois, in Charles Friend & Co. v. Goldsmith & Seidel Co., 138 N. E. 185, on this subject is both interesting and instructive:

"In fact, however, a corporation has no home, domicile, residence or citizenship in the sense in which those terms are applied to natural persons. Whenever those words are applied to a corporation it is in a figurative sense, and they are used with a vagueness of meaning which arises from the fact that they are metaphorical. A corporation is not a citizen of any state or country. Every definition of 'citizen' implies a person inhabiting a city, town or state, and possessed of some rights because of that fact. Corporations, though not citizens, are held to be citizens of the state of their creation for the purpose of determining the jurisdiction of the federal courts (Wisconsin v. Pelican Ins. Co., 127 U. S. 265), but they are not citizens within the meaning of section 2 of article 4 of the Constitution, which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states (Paul v. Virginia, 8 Wall. 169), nor within section 1 of the Fourteenth Amendment, which prohibits any state from making or enforcing any law which shall abridge the privileges or immunties of citizens of the United States (Orient Ins. Co. v. Daggs, 172 U. S. 557), though they are persons, within the same section who, may not be deprived of their property without due process of law or denied the equal protection of the laws (Minneapolis & St. Louis Ry. v. Beckwith, 129 U. S. 26)."

FALL OVER EMBANKMENT NOT COVERED BY COLLISION POLICY.—Damage to an automobile by contact with the earth in falling over an embankment is held by the Supreme Court of Alabama, in Continental Casualty Co. v. Paul, 95 So. 814, not to be covered

by a policy insuring against damage due to "collision with any moving or stationary object." In this respect the Court said:

"The burden rested upon the plaintiff to show, in the language of the policy as alleged in the complaint, that the damage sustained was the result of a collision with some object either moving or stationary. There was no evidence offered of the existence of any object with which the car did or could have collided. The car was stopped upon an incline—a sufficient incline to cause the plaintiff to place rocks behind the rear wheels. If the brakes failed to hold, and the car of its own momentum, without the application of exterior force, and simply in obedience to the law of gravity, rolled down the embankment to the bottom of this cut, we are clear to the view that the damages thus sustained would not be the result of a collision with 'any moving or stationary object.'

"Numerous definitions of the word 'collision,' as used in contracts of this character, may be found noted in the opinion of the Supreme Court of Michigan in the case of Universal Service Co. v. Am. Ins. Co., 213 Mich. 523, 181 N. W. 1007, 14 A. L. R. 183, as well, also, in Bell v. Am. Ins. Co., 173 Wis. 533, 181 N. W. 733, 14 A. L. R. 179.

"In answer to the insistence that a car which is merely upset and falls down an embankment is damaged as the result of a collision because it comes in contact with the earth, the Wisconsin Court said:

" 'One instinctively withholds assent to the result. The reason is that it makes a novel and unusual use and application of the word 'collision.' We do not speak of falling bodies as colliding with the earth. In common parlance the apple falls to the ground; it does not collide with the earth. So with all falling bodies. We speak of the descent as a fall, not a collision. * * * The incident causing the damage to the automobile here in question is spoken of in common parlance as an upset or tipover. * * * We cannot presume that the parties to the contract intended that an upset should be construed as a collision in the absence of a closer association of the two incidents in popular understanding.'

"In support of this conclusion we cite the following authorities: Hardenbergh v. Employers' Liab. Ass'r, 80 Misc. Rep. 522, 141 N. Y. Supp. 502; Moblad v. West. Indemnity Co. (Cal. App.), 200 Pac. 750; O'Leary v. St. Paul Fire, etc., Ins. Co. (Tex. Civ. App.), 196 S W. 575; Stuht v. U. S. Fid. & Guar. Co., 89 Wash. 93, 154 Pac. 137.

"Such a state of facts as were involved in Universal Service Co. v. Am. Ins. Co., supra, and in Harris v. Am. Cas. Co., 83 N. J. Law, 641, 85 Atl. 194, 44 L. R. A. (N. S.) 70, Ann. Cas. 1914B, 846, are not here presented, and like questions as there considered will be only treated here as they arise.

"In Interstate Cas. Co. v. Stewart (Ala. Sup.), 94 South. 345, the driver of the automobile lost control of his car, which started down the hill and ran into an embankment on the side of the road. The embankment was held to be a stationary object within the meaning of the insurance clause similar to that here involved. We think this ruling fully sustained by sound reasoning as well as by the authorities, but the holding in that case is without application here. This Court in the Stewart Case, supra, cited with apparent approval Bell v. Am. Ins. Co., from which the above quotation is taken, as well as some of the other authorities herein cited."

DOES NON-PAYMENT OF NOTES GIVEN BY BANKRUPT IN COMPOSITION REVIVE ORIGINAL DEBT.—In the case of Jacobs v. Fensterstock, 118 Misc. (N. Y.) 266, aff'd in 202 App. Div. 795 on the opinion of the court below, written by Gavegan, J., the facts briefly told are as follows:

After an order of confirmation of a composition in bankruptcy had been duly made the cash payment, as well as certain promissory notes provided for in the composition agreement, were distributed, but the notes were thereafter dishonored and remained unpaid. There was nothing in the offer of composition, in the order of confirmation, or in any other document, as to the consequence of failure to pay the notes. Thereafter an action was brought by one of the composition creditors, whose claim had ben filed wih the refereee in bankruptcy, for the price of certain goods sold and delivered. The defendant pleaded, by way of defense, his discharge, resulting from the composition in bankruptcy. Plaintiff contended, by way of attempt to overcome this defense, that the discharge in bankruptcy was, as a matter of law, conditional on payment of the composition notes, and that, on the defendant's failure to pay said notes the original debt, with interest, revived.

Mr. Justice Gavegan held, and the Appellate Division agreed, that the discharge in bankruptcy was a complete defense, and that it was

therefore necessary to set aside a jury verdict rendered in plaintiff's favor and to dismiss the complaint.

The United States Circuit Court of Appeals for the Second Circuit has recently held similarly in the matter of Mirkus Bros., bankrupts. As this is primarily a Federal question, the view adopted by the Court in the Mirkus case will probably be followed. Mr. Loveland's view, as stated in his work on Bankruptcy, seems to be erroneous.

THE REMOVAL OF TRUSTEE OF CHARITIES ON THE GROUNDS OF NON-RESIDENCE IN THE JURISDICTION AND WRONGFUL DELEGATION OF THE PERFORMANCE OF DISCRETIONARY DUTIES.

By Ralph Stanley Bauer

Charitable trusts constantly increasing in numbers, in wealth, and in importance, their honest, regular and equitable management is a matter of growing interest and vital concern to the general public. But, while these charitable trusts have become vastly larger and more numerous in recent years, there seems to be no reason to believe that most of them are given any more careful attention by their trustees than they were given when such trusts were smaller and fewer. In fact, as these trusts grow in size, it becomes more and more common to call into trusteeships business and professional men and absentees having large interests elsewhere and therefore unable to devote much time to the important interests of the charitable trust committed to them. May a trustee of a charitable trust be removed by reason of his non-residence in the state? May he be removed for wrongfully delegating the performance of his duties?

Let us first consider some typical modern instances of lax administration of trusts by busy trustees often absent from the jurisdiction. The A charitable foundation is established, with trustees from various states. Many meetings of trustees are held and much business transacted with a bare quorum present. Some of the trustees never attend a meeting. Some of these absentee trustees will simply say, when informed of the general nature of the business transacted, "That's all right." Other absentees will not even learn of the general effect of important steps taken. B college is founded, a private corporation, not for profit, devoted to the education of the young. Busy and active business and professional men from various states are selected as trustees, often because of the prestige which their names are supposed to add to the undertaking. The college may be in the South or West, and a prominent lawyer or statesman or politician or merchant in the East may listen to the entreaties of his friends and become a member of the board of trustees of a college whose buildings, students and faculty he does not hope ever to see or perhaps hopes never to be put to the trouble of seeing. Being a stockholder in private corporations for profit, in which he is accustomed to vote by proxy, he sees nothing wrong in giving his blank proxy to some trustee living nearer to the college; or, still worse, he sends his blank proxy to the chief executive officer or president of the college, to vote as the president may desire—to the president, the very official whose negligent or imprudent management of the institution can be checked only by the vigilance of the trustees. Usually, of course, it is not a lawyer-trustee who will practice such irregularities.

The most elementary knowledge of the law of trusts would include knowledge of the fact that a trustee cannot be considered as having any right whatever to treat the management of the trust fund with the same laxity with which he might treat his own affairs. Likewise, the most elementary knowledge of the subject would include knowledge of the rule that a trustee, like an agent, cannot rightfully delegate the performance of duties involving the exercise of discretion.[1]

(1) See 3 Pom. Eq. Jur. (4th ed.), 1068, 1069.

The fact that the trustee is a non-resident of the state in which all of the trust's business is transacted will not, of itself, constitute ground for removal of the trustee. There is no absolute rule that a non-resident cannot be a trustee. But non-residence becomes an important operative fact when coupled with neglect of duty.[2] A person out of reach of the process of the court, particularly if he never comes inside the jurisdiction at all in the performance of his duties as trustee, can never, from the standpoint of the court, be a satisfactory trustee. How can any complainant then have any effective remedy against the trustee in the court that ought to be able to control the administration of the trust? It has been held, and very properly, that where a trustee resides out of the state and neglects to give attention to his duties as trustee, he may be removed.[3] Delegation of the performance of discretionary duties occurs only where the trustee wrongfully fails to do the duties himself. Where the trustee only occasionally delegates the performance of discretionary duties, a court might not see fit to remove him, for his failure in the performance of his duties would not necessarily be so important as to justify action so drastic. Any delegation whatever of the performance of discretionary duties is serious, but the question whether the wrong thus committed is so important as to justify the removal of the trustee, is a question always addressed to the discretion of the court. Habitual and continual failure to perform his discretionary duties personally, and habitual and continual delegating of the performance of discretionary duties to others, will often bring about a situation wherein the court, in order best to preserve the trust property and best to serve the interests of the *cestuis que trustent*, will feel impelled to remove the trustee. Couple this with non-residence, and it would seem that a very clear case for the removal of the trustee is made.[4]

An important reason for a court's removing the trustee that wrongfully delegates the performance of his discretionary duties, is that the discretionary acts done by the trustee's delegate are void. Being void, but supposed by those concerned to be good, these acts may lead to troublesome complications involving property sold by the trustees and various relations with many persons.[5]

The strength of the position of complainants asking the removal of a trustee under such circumstances will be seen in a still brighter light when account is taken of the rule that a trustee may be removed by the court where it is to the advantage of the trust, even if no misconduct is shown.[6]

Can the court remove the trustee in such cases only if empowered by statute? It seems that generally the power to remove the trustee is a power existing in courts of equity, independently of statutory provision.[7]

If the trustee imagines that laxity of management of a public or charitable trust is even as safe and simple for the trustee as in the case of a private trust, he may be very unhappily disillusioned; for the trustee of a private trust may and often does easily succeed in inducing the *cestuis que trustent* to acquiesce in or agree to his poor method of management, while the trustee of a public trust would find no member of the general public able to release him from the legal consequences of his folly.[8]

(2) See 3 Pom. Eq. Jur., 1087. It seems that permanent removal of a trustee from the jurisdiction justifies his removal, although there is no rule that the court must remove him.

(3) Lill v. Neafie, 31 Ill. 101.

(4) For circumstances under which delegation to co-trustee has been held to be ground for removal, see Lathrop v. Smalley, 23 N. J., Eq. 192.

(5) "If the trust be of a discretionary character, not only is the trustee answerable for all the mischievous consequences of the delegation, but the exercise of the discretion by the substitute will be actually void." Lewin, Law of Trusts (12th ed.), p. 288, citing English cases.

(6) Lewin, Law of Trusts (12th ed.), p. 1088.

(7) 39 Cyc. 265, and cases there cited. The complainant brings his bill in chancery for the removal of the trustee. Zehnbar v. Spillman, 25 Fla. 591, 6 So. 214.

(8) In England, it seems that the Attorney-General, as representing the charity, may sanction a compromise with the trustee. Lewin on Trusts (8th ed.), p. 1212. But this seems only to include

Who can bring the action to remove trustees of a public or charitable trust? The State represents the public, the real *cestuis que* trust. The Attorney-General has, in England, brought such actions. Though case authority in American courts of last resort seems to be utterly lacking, the question has sometimes arisen in circuit courts in this country, and it has been decided that the Attorney-General of a state is the proper official to institute the action for the state in behalf of the public.[9]

Clearly, the non-resident trustee who delegates the performance of his discretionary duties may, at the discretion of the court, be removed. The Attorney-General of the state may bring the action.

BANKS AND BANKING—BRANCH BANKS

STATE v. FIRST NAT. BANK

249 S. W. 619

Supreme Court of Missouri (March 3, 1923)

Rev. St. U. S. § 5190 (U. S Comp. St. § 9744), providing that the usual business of each national bank shall be transacted at an office or banking house located in the place specified in its organization certificate as required by section 5134, subd. 2 (U. S. Comp St. § 9659), cannot be reasonably construed as permitting it to be conducted at offices or houses, and therefore does not authorize the establishment of branch banks by a national bank.

Original proceeding in quo warranto by the State, on relation of Jesse W Barrett, Attorney-General, against the First National Bank of St. Louis. Judgment of ouster ordered.

Jesse W. Barrett, Atty.-Gen., and Merrill E. Otis, Asst. Atty.-Gen (Sam B. Jeffries, Carter, Collins & Jones, H. R. Small, Foristel & Eagleton, Marion C. Early and T. F. Chaplin, all of St. Louis, of counsel), for petitioner.

Jones, Hocker, Sullivan & Angert, of St Louis, for respondent.

WALKER, J. This is an original proceeding in quo warranto to determine the authority of a national bank engaged in business in the city of St. Louis to establish and conduct a branch bank at another than its regular place of business in said city.

the case where a defendant trustee has been accountable for a very long period, but the right, if enforced, would impose a great hardship. Id.

(9) See Pom. Eq. Jur. (4th ed.), 1096 (at p. 2534), for the rule.

[1, 2] I. A national bank is an artificial legal entity, created to facilitate the transaction of fiscal affairs under the authority of the laws of the United States. Like other corporations, it possesses such powers as are granted to it by the act of its creation, or, more comprehensively stated, which have been or may be conferred upon it by Congress within the limitations of the Federal Constitution. This reference as to the origin of its powers does not, as we shall subsequently show, prevent state legislation in regard thereto. Existing, as it necessarily does, by law, it possesses only such powers as are expressly granted or which may necessarily be implied for the effective discharge of its corporate functions. As to powers expressly granted, no difficulty need be encountered in defining their limitations As to those incidental, it must appear, to authorize their exercise, that they are clearly within the scope and purview of the purpose for which the corporation was created. This rule is especially applicable when it is sought to invoke what are termed the powers of a corporation incident to it at common law; such application being authorized only when it is apparent that the power invoked is a necessary incident to the proper exercise of the corporation's existence or functions. Kerens v. Trust Co., 283 Mo. loc. cit 621, 223 S. W. 645, 11 A. L. R. 288; State ex inf. Missouri Ath. & St. L. Clubs, 261 Mo. loc cit. 599, 170 S. W. 904 L. R. A. 1915C, 876, Ann. Cas. 1916D, 931; Millinery Co. v. Trust Co., 251 Mo. loc. cit. 575, 158 S W. 359.

These rules are elementary in character to the extent that they may be termed horn-book law on this subject. They have been stated to emphasize their general application to all classes of corporations in the absence of statutes to the contrary. While we have contented ourselves with the citation of cases in this behalf determined within our own jurisdiction, they assert a general doctrine, which does not contravene the rulings of any court, state or national, when rightly considered: To illustrate: In Bullard v. Bank 18 Wall. loc. cit. 593, 21 L. Ed. 923, it was held that:

> "The extent of the powers of national banking association to be measured by the act of Congress under which such associations are organized."

In Logan, etc., Bank v. Townsend, 139 U. S. loc cit. 73, 11 Sup. Ct. 496, 35 L. Ed. 107, it was announced with equal emphasis that:

> "It is undoubtedly true, as contended by the defendant, that the National Bank Act is an enabling act for all associations organized under it, and that a national bank

cannot rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established."

To a like effect are the following cases: Bowen v. Needle Nat. Bk., 94 Fed 925, 36 C. C. A. 553; Commercial Nat. Bk. v. Pirie, 82 Fed. 799, 27 C. C. A. 171, 49 U. S. App. 596; Hanover Nat. Bk. v. Burlingame Nat. Bk., 109 Fed. 421, 48 C. C. A. 482; Hyde v. Equit. Life Assur. Soc., 61 Misc. Rep 518, 116 N. Y. Supp. 219; Ocmulgee Riv. Lum. Co. v. Ocmulgee Val. Ry. Co. (D. C.), 251 Fed. 161; State v. Am. Sugar Ref. Co., 138 La. 1005, 71 South 137; Somerville Water Co. v. Somerville, 78 N. J. Eq. 199, 78 Atl. 793; Knapp v. Sup. Commandery, 121 Tenn. 212, 118 S. W. 390.

Guided by these rules a reference to and a review of the laws creating national banks and defining their powers is of first consideration.

[3] Persons desiring to form a national bank are required, among other things, under the act of Congress of June 3, 1864 (National Banking Act), to file with the Comptroller of the Currency a statement of the place where its operations of discount and deposit are to be carried on, designating the state, territory, or district and the particular county, city, town, or village. Subdivision 2, § 5134, p. 3455, 3 Comp. Stat. U. S. 1901, now U. S. Comp. St. § 9659. A subsequent section of the same act provides that the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate. Section 5190, p. 3486, 3 Comp. Stat. U. S. 1901, now U. S. Comp. St. § 9744.

No express power to establish a branch bank appears in either of these statutes. Section 5134, in requiring the certificate of organization to designate the county, city or town in which the bank is to be located, is intended for the information of the Comptroller in enabling him to intelligently determine whether the authority sought to be exercised should be granted. While the Banking Act is silent on the subject, a construction of same is not unreasonable which clothes the Comptroller with at least such discretion in the premises as will enable him to act intelligently or with a proper regard for the demands of business in approving or rejecting the articles of organization. Hence a general designation of the proposed business location as provided in said section is all that is necessary.

The purpose of section 5190 is not for the information of the Comptroller, it being a matter with which he has no concern, when he has granted the articles, as to where the place of the business shall be located within the county, city or town. This is a matter to be determined by the board of directors in establishing the business. To render their act specific it must be confined to the terms of the statute, viz, to "an office or banking house within the county, city or town" named in the articles. This location having been established, it is within the contemplation of the statute that the power of the bank is to be there exercised. Otherwise the words "an office or banking house" ceased to be specific, and instead of being singular in number may be construed as plural, and thus permit the establishment of banks in as many places within the county, city or town as the judgment of the directors may prompt. Such a construction finds no resting place in reason. If followed, it would, instead of centralizing and rendering more stable the powers of a bank, enable it, by multiplying its places of business, to subdivide and at the same time extend its powers in such manner as to stifle competition. Such an effect was certainly never contemplated by the Banking Act.

II. We are more concerned, however, with an interpretation of the language of subdivision 7 of section 5136 (U. S. Comp. St. § 9661), granting incidental powers, whether literally or liberally construed than with the probable effect of its operation under the construction sought to be given to it by the respondent. If, as we have stated, the terms of section 5190 be unmistakable in limiting the location of the place of business, such location, so long as maintained, will, under the terms of the statute, exclude by implication the establishment of a branch bank, the business of which is to be conducted under the authority of the original articles of organization. However, it is contended that the power to establish branches is authorized under section 5136. The language of subdivision 7 of that section provides, among other things, that the board of directors of a bank may, subject to law, exercise all such incidental powers as shall be necessary to carry on the banking business. Several preliminary assumptions are necessary before substantial color can be given to this contention. First, section 5190 must be so construed as to authorize the transaction of a bank's business at offices or banking houses, instead of at "an office or banking house"; second, the establishment of a branch bank must be held to be the exercise of an incidental power; third, such power, when exer-

cised, must be within the law; and, fourth, it must be necessary to the transaction of the banking business.

[4] The first assumption we have discussed with the result that the unmistakable character of the words employed and the purpose to be accomplished did not in our opinion, authorize such an interpretation of the section as to enable its terms to be read in the plural as well as the singular number. The second involves the question as to the meaning of incidental powers. The statute (subdivision 7, § 5136) employs the word "incidental," rather than the word "implied" in designating the power other than that expressly conferred on the board of directors. An incidental power, as we said in State ex inf. Harvey v. Missouri Ath. & St. L. Clubs, 261 Mo. loc. cit. 599, 170 S. W. 904, L. R. A. 1915C, 876, Ann. Cas. 1916D, 931, is one directly and immediately appropriate to the execution of the powers expressly granted and exists only to enable the corporation to carry out the purpose of its creation (citing cases). An implied power is one that may be inferred from that granted, or, as the Supreme Judicial Court of Massachusetts has said (Adams v. Marshall, 138 Mass. 228, 52 Am. Rep. 271), it is a grant or reservation by implication of law. In State ex inf. Harvey v. Missouri Athletic Club, supra, we defined an implied power more elaborately as one "possessed by a corporation, not indispensably necessary to carry into effect others expressly granted, and comprises all that is appropriate, convenient and suitable for that purpose, including as an incidental right a reasonable choice as to means to be employed in putting into practical effect a power of this character." Without chopping logic or refining distinctions as to these adjectival words, it will suffice to say that in statutes and judicial opinions they are frequently interchangeably used. 3 Thomp. Corp. (2d Ed.), § 2105. This need not concern us, however, in the determination of respondent's contention, as the statute uses the word "incidental," and to this we will give attention.

[5] What, therefore, are the powers of a national bank "directly or immediately appropriate to the execution of the specific powers granted?" The provisions of subdivision 7, following the phrase conferring incidental powers upon the board of directors, furnish examples from which, by analogy, the scope of this character of powers may be determined. They include the discounting and negotiating of promissory notes, drafts, bills of exchange, and other evidences of debt; the receiving of deposits; the buying and selling of exchange, coin, and bullion; the loaning of money on personal security; and the obtaining, issuing and circulating of notes. While these powers are distinct, and neither is a limitation upon either of the others, they cannot be otherwise held than as directly and immediately appropriate to the transaction of the banking business. Although they may not be such incidental powers as are given generally to all banking institutions, they are incidental to banks created under the National Bank Act. Seligman v. Charlottesville Nat. Bk., 3 Hughes, 647, Fed. Cas. No. 12,642. While a national bank may lawfully do many things in securing and collecting its loans in the enforcement of its rights and the conservation of property previously acquired, the exercise of such powers is incidental in being necessary for the purpose of carrying into effect the powers expressly granted. Morris v. Springfield Third Nat. Bk., 142 Fed. 25, 73 C. C. A. 211; Cooper v. Hill, 94 Fed. 582, 36 C. C. A. 402. The cases cited are illustrative of the limitations upon the latitude given national banks not in the character of acts they may primarily engage in as a business but in the management and protection of property and property rights acquired in the usual banking transactions, including such minor incidental powers in addition as may be adopted to the ends in view.

In addition to those cited the trend of the cases defining the incidental powers of national banks is in harmony with the foregoing conclusion. The apparent purpose for the establishment of branch banks is to multiply the places of business of the principal bank and thereby increase the volume of same. As a manifestation of commercial progress, the effort may well be commended. That phase of the matter however, is not under consideration. It is a question of power and not progress that demands solution. Certainly it is in no sense essential to the exercise of any of the powers granted nor is it a necessary incident to the carrying on of the banking business, within the meaning of the statute.

The third limitation necessary to be observed before an incidental power can be invoked by a national bank, is that it must be "within the law." The law referred to is the National Bank Act to which banks organized thereunder owe their existence, and within the scope and purview of which they must exercise their functions. The sections of the act reviewed lend no countenance to the contention that the establishment of branch banks is within the scope and purview of these sections, and hence not within the law.

The fourth and last limitation upon the exercise of incidental power by a board of directors required by subdivision 7, is that such power shall be necessary "to carry on the business of banking." In a review of the other conditions necessary to the exercise of power referred to, we have held that the carrying on of the banking business did not require the establishment of branch banks, and hence that it was not within the terms of the statute.

[6] III. An unambiguous statute, such as the National Bank Act, does not require the adventitious aid of subsequent kindred legislation to determine its meaning. Despite this fact where, as here, there is a general grant of power, however clear that grant may be, the enactment of subsequent legislation containing a specific kindred grant of power will afford at least persuasive support to the conclusion that the latter was not included within the former or the original grant Such is the effect of the Act of Congress of March 3, 1865, section 5155, 3 U. S. Comp. Stats. 1901, p. 3467, now U. S. Comp. St. § 9695 This act provides that any bank or banking institution organized under a state law and having branches, may in conformity with existing law become a national bank and retain its branches. In the passage of this act it is evident that the legislative construction of the original is that it did not authorize the establishment of branch banks. Otherwise the subsequent section 5155 would not have been enacted. A recognition of the limitations of the National Bank Act is evident from the fact that the right of a national bank to have branches as provided in said section is limited to states the banking laws of which authorize the establishment of branches.

[7] The establishment by special acts of Congress of a branch bank at Chicago during the Columbian Exposition, and at St. Louis during the Louisiana Purchase Exposition, affords further evidence of legislative construction of the National Bank Act, which excludes from its incidental powers the right to establish branch banks. In addition it is a well-established rule of construction that a long-continued interpretation of a statute by public officers charged with its execution, while not controlling upon the courts, is entitled to special consideration. McAllister v. Cupples Station, 283 Mo. 115, 223 S W. 75; State ex rel. Chick v. Davis, 273 Mo. 660, 201 S. W. 529; State ex rel. Kinloch Tel. Co. v. Roach, 269 Mo. 437; 190 S. W. 862; Ewing v. Vernon Co., 216 Mo. loc. cit. 689. 116 S. W. 518. Apropos of the foregoing, it is shown that the Attorneys General of the United States have uniformly construed the National Bank Act as not authorizing the establishment of branch banks.

[8] IV. Enough has been said to demonstrate the fact that neither by express terms nor reasonable implication can it be held that national banks are authorized to establish branches in states which have not granted that authority to banking corporations doing business therein. This being true, it remains to be determined whether the processes of the state can be invoked to prevent the exercise of power by a national bank shown to be ultra vires under the law of its creation. That national banks are corporate entities which owe their existence to federal law alone, and as such are subject to the paramount authority of the United States, there can be no question. Equally as well established is the fact that a state cannot, through its legislative department, define the duties of national banks or control their affairs whenever such attempted exercise of authority expressly conflicts with the law of the United States. Davis v. Elmira Savings Bk., 161 U. S. 275, 16 Sup. Ct. 502, 40 L Ed. 700; McClellan v. Chipman, 164 U. S. 356, 17 Sup. Ct. 85, 41 L. Ed. 461.

[9] The information filed herein by the Attorney General does not involve the commission of an act in conflict with the laws of the United States, nor does it tend to impair the efficiency of any agency of the national government. It cannot, therefore, be said to be in conflict with the rule above announced, and hence does not violate it. This conclusion finds ample support in a review of the National Bank Act alone; but, if further reasons therefor are deemed necessary, they may be found in an illuminating discussion by the Supreme Court of Kentucky (First Nat. Bk. v. Com., 143 Ky. 816, 137 S. W. 518 34 L. R A. [N. S.] 54, Ann. Cas. 1912D, 378), defining the limits that may be placed upon the federal control of national banks, or, conversely, the extent to which the state may exercise control over them. The state court ruled in the affirmative on this question. The objection was made that the bank was an agency of the federal government, for which Congress had provided a complete system of control and regulation, and that the state could not in any manner interfere with its affairs, and that state laws applicable to banks incorporated within the state were inoperative as to national banks. The court held, in effect, that while a state cannot, either by its Constitution or legislation, directly or indirectly regulate or control the organization or conduct of a national bank, so as to interfere with the business for which it was created,

the laws of the state applicable to banks and other corporations organized therein may be invoked against a national bank, when it attempts to exercise rights or do things outside the scope of the business it was created to conduct and which is not essential to its existence or efficiency; that when a national bank exceeds the purpose of its creation, and goes beyond the scope of its functions, the state may deal with such of its transactions as are in excess of the authority conferred upon it by Congress and in violation of the laws of the state in the same manner as it would deal with the business or property of any other banking corporation. The rule as thus announced is supported by the holding of the United States Supreme Court in the Davis Case, supra, in which, after declaring the paramount authority of the federal law over national banks, it was said that:

"Nothing * * * in this opinion is intended to deny the operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purposes of congressional legislation."

A further ruling to like effect by the United States Supreme Court is found in the McClellan Case, supra In that case an insolvent debtor conveyed real estate to a national bank thereby giving it a preference. This act was assailed by the other creditors as in violation of a state statute. The bank resisted the right of the creditors as thus asserted, upon the ground that national banks, under the federal laws, were authorized to take deeds to real estate to secure pre-existing debts, and that the Massachusetts statute was in conflict with the act of Congress, and hence inoperative. The Supreme Court held that the state law was not in conflict with the act of Congress, and that the other creditors had a right to share in the property conveyed to the bank. The exhaustive manner in which the question was considered is shown in the following excerpt from the opinion:

"National banks 'are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state laws. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.' * * * Nor is there anything in the statutes of the State of Massachusetts, here considered, which in any way impairs the efficiency of national banks or frustrates the purpose for which they were created. No function of such banks is destroyed or hampered by allowing the banks to exercise the power to take real estate, provided only they do so under the same conditions and restrictions to which all the other citizens of the state are subjected, one of which limitations arises from the provisions of the state law which in case of insolvency seeks to forbid preferences between creditors. Of course, in the broadest sense, any limitation by a state on the making of contracts is a restraint upon the power of a national bank within the state to make such contracts; but the question which we determine is whether it is such a regulation as violates the act of Congress. As well might it be contended that any contract made by a national bank, within a state in violation of the state laws on the subject of minority or coverture, was valid because such state laws were in conflict with the act of Congress or impaired the power of the bank to perform its functions."

[10] V. In this state the banking business can be conducted only by a corporation. Thus organized, the extent of its powers must, as we have said, be determined by the statute of its creation. The state banking act gives express recognition to this rule in providing that banks, whether incorporated under federal or state law, can transact only such business as is permitted by the laws of the United States or of the state. Section 11684, R. S. 1919. Branch banks not having been permitted by the state law, either by express terms or necsary implication, the well-recognized canon of construction will authorize the exclusion of this power from those granted. Reliance upon this rule, is, however, unnecessary in the presence of a subsequent section (section 11737, R. S. 1919) in which it is provided:

"That no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house."

The attempt, therefore, of the respondent to establish a branch bank, is not only an act in excess of its corporate powers, but in violation of an express statute.

The writ of quo warranto invoked by the relator is a recognized right and an appropriate remedy under the circumstances. State ex inf. Attorney General v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902. Upon an appeal to

the Supreme Court of the United States in the Standard Oil Case that court held (224 U. S. 270, 32 Sup. Ct. 406, 56 L. Ed. 760, Ann. Cas. 1913D, 936) that the proceeding by quo warranto which had been instituted in the state Supreme Court in that case by the Attorney General was authorized. Discussing the powers of the Missouri Supreme Court in the premises, it was held that:

"Its decision and judgment necessarily imply that under that clause of the Constitution it had jurisdiction of the subject-matter, and authority to enter judgment of ouster and fine in civil quo warranto proceedings. That ruling is conclusive upon us, regardless whether the judgment is civil or criminal or both combined."

[11] VI. The right of the Attorney General to institute this action having been established, the question arises, although it does not seem to be seriously contested, as to the tribunal in which it should be brought. The Sixteenth subdivision of section 24 of the national Judicial Code (U. S. Comp. St. § 991) provides, among other things, that the United States District Courts have original jurisdiction—

"of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank, and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located."

The United States statutes further provide that national banks shall have power "to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." R. S. U. S. § 5136, U. S. Comp. Stats. §9661. Under R. S. §5198 (3 U. S. Comp. Stat. 1901, p. 3493, now U. S. Comp. St. § 9759; 6 Fed. Stat. Ann. p. 928), prescribing where suits may be brought against national banks, it is provided:

"That suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

Under the proviso of an act of Congress approved July 12, 1882 (U. S. Comp. Stat § 9668), it is further provided:

"That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking association may be doing business when such suits may be begun; and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

From the foregoing it will be seen that, as this case does not fall within the inhibitations of the federal statutes quoted, jurisdiction of same may be entertained by this court. In Herrmann v. Edwards, 238 U. S. 107, 35 Sup. Ct. 839, 59 L. Ed. 1224, the United States Supreme Court construed subdivision 16 of section 24 of the National Judicial Code, and held, as it must have held within the unmistakable meaning of said subdivision, that state courts were clothed with jurisdiction to hear and determine all cases against national banks except those exempted under said subdivision. The case at bar does not fall within those exemptions. This is not a proceeding to deprive the respondent of any right or limit the exercise of any power conferred upon it by the laws of the United States, but to prevent it from committing an act in violation, under the established rules of construction, of the laws of its creation and expressly contravening a state statute.

[12] The character of a judgment in quo warranto cases is largely within the discretion of the court, and foreign corporations may, under numerous precedents, be prohibited by a general ouster from committing particular illegal acts. State ex inf. Attorney General v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902; State ex inf. Attorney General v. Standard Oil Co., 194 Mo. loc. cit. 149, 91 S. W. 1062; State ex inf. Attorney General v. Armour Packing Co., 173 Mo. loc. cit. 366, 73 S. W. 645; 61 L. R. A. 464, 96 Am. St. Rep. 515; State ex inf. Attorney General v. Firemen's F. F. Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363; State

ex inf. Attorney General v. Arkansas Lumber Co., 269 Mo. 371, 190 S. W. 894.

In view of all of the foregoing, judgment of ouster as prayed in the pleadings is hereby ordered.

All concur, except RAGLAND, J., not sitting.

NOTE—*Right of National Bank to Establish Branch Banks.*—The reported case seems to be one of first impression. In the Digest of Legal Opinions of Thomas B. Patton, page 110, sec. 532, it is said: "Under the present Federal law, national banks are not permitted to establish branches, either in or outside of the city in which they are located. Except that section 25 of the Federal Reserve Act authorizes national banks having capital of $1,000,000 or more, upon permission of Federal Reserve Board, to establish branches in foreign countries or dependencies or insular possessions of the United States."

The case of Armstrong v. Second Nat. Bank, 38 Fed. 883, holds that under Rev. St. U. S. sec. 5190, providing that "the usual business of each national bank association shall be transacted at an office or banking house located in the place specified in its organization certificate," a national bank cannot make a valid contract for the cashing of checks upon it, at a different place from that of its residence, through the agency of another bank.

In re Lowry National Bank, 29 Op. Atty. Gen. 81, the Attorney-General declared that section 5190 Rev. St., properly construed, restricts the carrying on of the general banking business of a national bank to one office or banking house in the place designated in the association's certificate of organization.

However, there is a clear distinction between a branch bank and an agency (29 Op. Atty.-Gen. 81), and a national bank may establish an agency for a specific purpose, such as dealing in bills of exchange. Bank of Augusta v. Earle, 13 Pet. 519; Bank v. Beach, Fed. Cas No. 2736.

Sam, the colored culprit, looked disreputable. The judge was stern.

"Looks like you had been drinking again."

"Yes, sah, jedge, dat was powerful stuff—some ob dis heh chicken hootch."

"I never heard of that."

"Well, sah, jedge, you take one drink ob chicken hootch an' you lay."

DIDN'T HELP IT MUCH

The presiding judge recently decided a contested point against a young lawyer in a civil law suit.

"Your honor," the young lawyer furiously declared, "I am amazed."

His senior, who felt that this would prejudice their case in the eyes of the judge, immediately arose.

"Your honor," he interposed, "I must apologize for the hasty remark of my young friend. By the time he is as old as I am he will not be amazed at anything your honor does."—Columbus Dispatch.

ITEMS OF PROFESSIONAL INTEREST

IMAGINARY INTERVIEWS AND CONTEMPT OF COURT

A matter of so remarkable a character was brought to the attention of the Court of Criminal Appeal in Rex v. Pomroy, Times, 20th inst., that the Lord Chief Justice requested the Director of Public Prosecutions, then present in court, to enquire into the incident with a view to initiating proceedings for "Contempt," if such should turn out to be proper. The facts were these: After conviction for murder of the appellant, and before the hearing of his appeal, an article appeared in a weekly illustrated journal headed "Bernard Pomroy's Secret: Amazing Interview with the Taxi-cab Murderer in the Condemned Cell by One who has visited him." The article went on to suggest that Pomroy had admitted to his visitor the existence of a suicide pact between him and his victim. One paragraph was headed "Pomroy's Vanity." According to counsel for the Crown no such interview had taken place; every person who had been permitted to visit the prisoner had been seen and had disclaimed any responsibility for the article. Counsel for the defense also intimated that no member of the accused's family who had been caused great distress by the appearance of such an article at such a time, was in any way responsible for it. Assuming that the instructions of both counsel were correct—for of course, erroneous information sometimes reaches counsel—it is obvious that the concoction of a wholly imaginary interview of such a kind is a quite indefensible form of literary device, whether intended to help or to injure the prisoner, or merely to entertain the reader. Comment *after conviction*, however, is not usually a ground of contempt, unless calculated to affect the issue of an appeal and that is not likely to be the result of a newspaper article. If the comment takes the form of a wholly imaginary interview, however, the question arises whether the publication between trial and the final operation of the law is not a criminal libel, for the essence of such a libel is the publication of a statement calculated to create a breach of the peace on the part of the libelled person or his relatives, by bringing him into hatred, ridicule or contempt. A convicted person under sentence of death, of course, cannot institute any civil proceedings, whether for libel or any other wrong.—Solicitors' Journal (Eng.), March 24, 1923.

BOOK REVIEWS

A NEW EDITION OF "WOERNER ON ADMINISTRATION (including Wills)"

Just issued is the third edition of the late J. G. Woerner's "American Law of Administration" (Little, Brown & Co., Boston). The new edition is the work of William F. Woerner, of the St. Louis bar, son of the author, who is himself not only considered an expert on probate law, but who as editor has the great advantage of having been thoroughly familiar with the work from its inception. It is a thorough revision, enlarging the book to three volumes, consisting of 2000 pages of concise text and notes, which bring the law of this live subject down to date, adding 5500 new cases, as well as innumerable statutory citations, to those in the old edition; and a number of new subjects also are treated. The new edition is prepared in every detail with such an eye to accuracy and completeness of treatment and attention to practical convenience as to make it invaluable to the practitioner and the court.

The scope of the work is prodigious. It covers about every conceivable point of law that can arise between the death of an owner of property and the investitute of the title in the new owner, whether creditor, widow, heir or devisee, treating in minute detail of the execution, contest and construction of wills, the law of devises and legacies, or descent inheritance and distribution of estates of decedents, of executors and administrators and their management of estates, of testamentory and probate courts, and the jurisdiction thereof and of the practice and procedure therein, of probate jurisdiction of Federal Courts, of the widow's allowance, and of dower, curtesy, homestead, estates of deceased partners, of claims and debts by or against estates, even of the liability of heirs and devisees after final accounting and discharge of the personal representatives—in short, it is safe to say that anything directly or indirectly relating to the realm of probate law is to be found within the pages of this work.

It is a marvelous feature of Judge Woerner's book that in a setting of profound understanding of the philosophy and reason of the law of his subject he presents in a most intensely practical and concrete form the precise thing that the everyday busy practical lawyer or judge is looking for.

Speaking of this remarkable phase of this work it has been well said that it "ranks as one of the few really great law books of the world. Elucidating his subject with transcedent insight into the genetic and underlying reasons of the law, Judge Woerner gave to the legal profession a great work representing the matured fruition of a profound mind, and ripened in the practical experiences of a notable career at the bar, crowned by a memorable incumbrancy of twenty-four years in the court where he daily administered the law of decedents' estates of which he wrote."

In their last law book bulletin the publishers justly say: "Rarely is a law treatise presented to the profession with so long an experience by the authors in the particular branch of the law as is offered in the new third edition of this standard work. Many years of experience by the authors as judge and leading practitioners at the bar in the large and wealthy city of St. Louis has made this work pre-eminent in breadth of treatment, accuracy and painstaking effort. * * * The third edition has been brought down to date by William F. Woerner who, with that pride that has been his even in the first edition, has presented the same accuracy and painstaking effort so prominent in the previous editions. It is, and for many years will remain, the leading treatise on the Law of Administration and Wills, to be cited and relied upon by both practitioners and courts with fond regard for the accuracy of statement which has become inseparably connected with the title."

CASES ON EQUITY JURISPRUDENCE

This is the second edition of Cases on Equity Jurisprudence, by Archibald R. Throckmorton, Professor of Law, Western Reserve University. It is one of the Hornbook Case Series, published by West Publishing Company, St. Paul, and is intended to be a companion book to the second edition of Eaton on Equity.

It is the purpose of the publishers to supply a set of illustrative Casebooks to accompany the various volumes of the Hornbook Series, to be used in connection with the Hornbooks for instruction in the class-room. Their object is to illustrate the principles of law set forth and discussed in the Hornbooks. They form an indispensable accessory in the proper instruction of law.

The Hornbook Case Series are bound in buckram, and are sold at a uniform price of $3.00 a volume.

DIGEST.

Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Attorney and Client**—Authority to Act.—Under Comp. Laws 1915, § 12404, it is not necessary for an attorney of the court to produce or file any warrant of attorney authorizing him to act.—Hempel v. Bay Circuit Judge, Mich., 193 N. W., 281.

2.——Basis of Fee.—Where a client contracted with his attorney to pay 35 per cent. of the amount received, in case of a settlement of his claim against a railroad, and client settled direct in consideration of the railroad's paying $4,800 and contracting to protect him against his attorney's claim, held, that the sum paid the client fixed the basis for computation of the attorney's percentage, and the railroad was not liable to the attorney for 35 per cent. of an amount based on the theory that $4,800 was 65 per cent. of the settlement.—Ward v. Donovan, N. Y., 139 N. E., 254.

3.——Representations.—A representation by an attorney to a prospective client that the question of securing for her her share in her husband's property in her suit for divorce presented a hard case did not relate to a matter as to which both parties had equal means of information, and therefore was an actionable representation of fact, if false, and not a mere expression of opinion.—Huffmaster v. Toland, Tex., 250 S. W., 468.

4. **Automobiles**—Driving Into Standing Freight Train, Contributory Negligence.—Where plaintiff drove his automobile on a dark night into a standing freight train with knowledge of the railroad track and highway crossing, he was guilty of contributory negligence precluding recovery for railroad company's violation of St. 1921, § 1326m, in obstructing the highway.—Worden v. Chicago & N. W. Ry. Co., Wis., 193 N. W., 356.

5.——Hypotheses as Evidence Excluded.—In an action for damages to plaintiff's automobile caused by a collision at a crossing, wherein plaintiff claimed that the engineer did not give the usual crossing signals, evidence by plaintiff that he would not have gone on the crossing if the signals had been given held properly excluded as not relevant to the issue of contributory negligence, which is such act or omission on the part of plaintiff, amounting to a want of ordinary care, as, concurring and co-operating with the negligence of defendant, becomes the proximate cause of the injury, and should be determined by existing conditions and not by hypotheses or contingencies.—Plyler v. Southern Ry. Co., N. C., 117 S. E., 297.

6.——Plaintiff Must Show That Servant Was About Defendant's Business.—No presumption arises from the fact that an automobile was owned by defendant, and at other times used in his business by the driver, that at the time of accident such servant was about defendant's business.—Lane v. Ajax Rubber Co., Conn., 120 Atl., 724.

7. **Bankruptcy**—Duty of Trustee to Obtain Possession of Books.—Where, after prior directing bankrupt to turn over his books to the receiver in bankruptcy was entered, a trustee was appointed, failure to turn over the books to either the receiver or the trustee was a contempt, and the trustee was the proper person to move to punish therefor; the trustee being the real party aggrieved.—United States v. Moore, U. S. D. C., 287 Fed., 879.

8.——Incriminating Evidence No Excuse for Withholding Property.—One becoming bankrupt or brought into a bankruptcy court has no right, under Const. Amend. 4 and 5, to delay surrender of the possession and title of any of his property to the officers appointed by law for its custody or disposition, on the ground that the transfer of such property will carry with it incriminating evidence against him, though such transfer may bring it into the ownership or control of one properly subject to subpoena duces tecum.—In Re Fuller, U. S. S. C., 43 Sup. Ct., 496.

9.——Right of Owner Where Securities Have Been Commingled.—Where bankrupt broker had mingled and hypothecated customers' securities, and banks holding same sold them and applied the proceeds to payment of their respective loans, and by agreement of creditors, who had traced their securities, the surplus over the loans had been paid to the trustee in bankruptcy, under an agreement that they be paid to such customers pro rata, one of such customers cannot assert any greater interest therein than the others, and he cannot claim any legal or equitable right or interest in other securities in the possession of the trustee which he is unable to trace as his property.—In Re Codman, Fletcher & Co., U. S. C. C. A., 287 Fed., 806.

10. **Banks and Banking**—Deposits for Special Purpose.—Generally, funds deposited in a bank for a special purpose known to the bank cannot be withheld from that purpose and set off by the bank against the debt due it from the depositor.—Wimberley v. Bank of Portia, Ark., 250 S. W., 334.

11.——Deposits Received When Insolvent.—Since there is no statutory provision relating to the liability of a bank a trustee ex maleficio for deposits received when insolvent, similar to the provision, in the statute making it a felony to receive a deposit in a bank knowing it to be insolvent, that knowledge of insolvency is imputed to the officer if by the exercise of reasonable care and diligence he could have discovered it, it is essential, to charge the bank as trustee, to show actual knowledge by its officers of the insolvency, and proof they could have discovered insolvency by the exercise of reasonable diligence is insufficient.—Fidelity & Deposit Co. v. Kelso State Bank, U. S. C. C. A., 287 Fed., 828.

12.——Joint Deposits.—Where owner of money deposited it in a bank in the name of himself and another, and certificate was made payable at maturity to either, the right of the other to withdraw the money was a mere power of attorney revocable by death of the owner.—Smith v. Planters' Sav. Bank, S. C., 117 S. E., 312.

13.——To Establish Trust Fund of Assets in Hands of Receiver.—In a suit by the owner of government bonds left with a bank for safe-keeping, and which were misappropriated by the bank or some of its officials, against the receiver of the bank, the plaintiff is not entitled to judgment decreeing the amount due him to be a trust fund and a lien upon the assets unless it is shown that the proceeds of the bonds were in some form a part of the assets which came into the hands of the receiver.—Nelson v. Paxton, Kan., 214 Pac., 784.

14. **Bills and Notes**—Comaker Liable Without Knowledge of Contents.—Where, though a comaker of a note given for fertilizer was unable to read and write, he did not request that the note be read to him, but signed it on the representation that he was not to be bound with the others and that he would get a discount of $2 a ton, held, that he was liable on the note as the contest is as to the construction of, and not the contents of, the note.—F. S. Royster Guano Co. v. Yeargin, S. C., 117 S. E., 199.

15.——Evidence of Ownership.—In an action on notes brought by a corporation, the possession of the notes by the secretary of the plaintiff was prima facie evidence of ownership by plaintiff.—General Inv. Co. v. Interborough Rapid Transit Co., N. Y., 139 N. E., 216.

16.——Failure to Stamp Does Not Destroy Negotiability.—Where a note, at the time of its purchase, is not stamped as required by the revenue laws of the United States, such failure to stamp does not destroy its negotiability, but is a circumstance to be considered in connection with all the other evidence in the case in determining whether or not the indorsee is in fact a holder in due course.—Security State Bank v. Brown, Neb., 193 N. W., 336.

17.——Indorsement Must Be Made On Note Or On Paper Attached.—To constitute a subsequent owner a holder in due course, an indorsement must be made on the note itself or on a paper attached thereto, but if that is done a separate assignment of the mortgage, which also refers to the note, cannot impair the effect of the commercial indorsement.—State Bank of Ottawa v. Kinnett, Kan., 214 Pac., 776.

18.——Omission of Stamp on Trade Acceptance.—The omission of proper revenue stamps from a trade acceptance does not constitute a good defense to an action thereon.—State Bank of Chicago v. Oyloe Piano Co., Iowa, 193 N. W., 403.

19. **Carriers of Goods**—Unreasonable Delay.—Where a suit by a shipper against a carrier was not brought until over six months after expiration of the two-year and one-day limitation period, as provided in the bill of lading, the trial court properly held that six months was more than a reasonable time for delivery, and therefore that suit was barred.—Hilbert v. Pennsylvania R. Co., Pa., 120 Atl., 778.

20. **Carriers of Grain**—Draft Returned Unpaid Title Reverts to Seller.—Where seller shipped oats under an "order notify" shipment, sold the draft with bill of lading attached to bank, and on buyer's refusal of shipment the draft was returned unpaid and by the bank charged to seller's account, but the bill of lading retained by the bank under its agreement to take charge of and sell the oats for the seller's account, held, that shipment was subject to attachment by seller's creditors, as title to the oats had revested in seller.—Davis v. W. H. Crozier & Co., S. C., 117 S. E., 309.

21. **Carriers of Passengers**—Boiler Explosion a Presumption of Negligence.—The burden was on defendant carrier to overcome the presumption that a boiler explosion resulting in injury to a passenger was not due to its negligence.—Butler County R. Co. v. Lawrence, Ark., 250 S. W., 340.

22. **Charities**—For Aged Poor.—Gift over to mayor and aldermen for aged poor, after qualified or determinable fee, was a gift for a "charitable use."—Inst. For Savings v. Roxbury Home For Aged Women, Mass., 139 N. E., 301.

23. **Constitutional Law**—Teachers' Retirement.—The Teachers' Retirement Law is not a police regulation but is a law intended to promote the educational interests of the state relating to the conditions upon which the public will contract with those undertaking to teach in the schools, and there is no constitutional requirement that such contract shall operate uniformly throughout the state; and, even if it is a police regulation, there is basis for the classification, so that the state could prescribe, as it did therein, one form of contract in one county and another form in other counties, without rendering it unconstitutional as denying equal protection of the laws.—State v. Levitan, Wis., 193 N. W., 499.

24. **Corporations**—Company Liable for Contracts of Constituent Company.—An express company, having taken over the assets of other express companies and announced that outstanding claims against such other companies would be adjusted by it as soon as possible, is liable for a loss and damage claim under a contract made by one of such constituent companies prior to the consolidation—Brabham v. Southern Express Co., S. C., 117 S. E., 368.

25.——Liability of Consolidated Corporation.—Under agreement between Director General of Railroads and certain express companies, whereby they agreed to, and did, create a new company and transferred their property to it in exchange for stock, and under the Act Cong. Feb. 28, 1920, § 407, subd. 7, authorizing the Interstate Commerce Commission to approve and authorize such consolidation, the new company held a consolidated corporation, subject to all the liabilities of the old companies, at least to the extent of the properties respectively transferred by them.—Gibson v. American Ry. Express Co., Iowa, 193 N. W., 274.

26.——No Breach of Implied Warranty Upon Latent Defects of Corporation Stock.—The petition in this case is construed as an action for damages, under § 4135 of the Civil Code of 1910, for the breach of an alleged implied warranty in the sale of corporate stocks upon the theory that the stock had a latent defect undisclosed, and was not merchantable and reasonably suited to the uses intended as an investment, by reason of the existing insolvency of the corporation, rendering it worthless. Held, in such a sale there is no implied warranty of the particular nature relied on, the same being "from the nature of the transaction, excepted." The purchaser does not show a liability of the seller "merely because the purchase of the stock was not a good investment."—Goodwyn v. Folds, Ga., 117 S. E., 335.

27. **Courts**—Jurisdiction Depending On Diversity of Citizenship.—Judicial Code, § 128 (Comp. St. § 1120), making judgments of the Circuit Court of Appeals final, where the jurisdiction depends on diversity of citizenship, requires dismissal of an appeal by receivers from the denial by the Circuit Court of Appeals of a temporary injunction, where the jurisdiction of the main cause depended on diversity of citizenship, though the injunction was sought on the ground that the threatened acts would deprive the defendant corporation of its property without due process of law.—Begg v. City of New York, U. S. S. C., 43 Sup. Ct., 513.

28. **Covenants**—In Deed Restricting Property Should Be Continuing.—Where a covenant in a deed provided that the buildings to be erected "shall be first-class private dwelings, erected for the use of one family only," the exaction survived mere erection and required that they should be private dwellings in reality and that the use for which the buildings were to be erected should be the one to which they should be devoted; the character implied by the words "should be" being a continuing one.—Baumert v. Malkin, N. Y., 139 N. E., 210.

29. **Custom Duties**—"Receiving" or "Concealing" Liquor.—"Possession" of liquor, made an offense under some circumstances by National Prohibition Act, is not the same thing as "receiving" or "concealing" it, which, when done knowing it to have been imported contrary to law is made an offense by Rev. St. § 3082 (Comp. St. § 5785).—Bookbinder v. United States, U. S. C. C. A., 287 Fed., 790.

30. **Damages**—Transfer of Insurance.—Where a seller of a car agrees to transfer a theft policy of insurance on it, and thus furnish insurance to the purchaser for a period, which was not done at the time of the sale, but which the seller thereafter promised would be done, and the purchaser relied on the continued promises of the seller, the purchaser is not barred from a recovery for the loss of the car by theft because he did not at once assume that the agreement had been repudiated and procure other insurance in order to mitigate the damages, but relied on the continued assurance of performance by the seller.—Winfrey v. Galena Automobile Co., Kan., 214 Pac., 781.

31. **Electricity**—Killed by Electric Shock Establishes Case Against Company Furnishing Current.—Evidence justifying a finding that a woman found dead near an electric washing machine in operation in the basement of her home was killed by electric shock is sufficient to establish a prima facie case of negligence against the company furnishing the electric current, and casts on it the burden of explaining the overloading of the wires extending into the basement with an excessive and dangerous current on some theory consistent with its exercise of due care in the maintenance, care, and management of its system, notwithstanding any defect in the washing machine motor.—Welsch v. Charles Frusch Light & Power Co., Iowa, 193 N. W., 427.

32. **Explosives**—Dealer Under No Obligation to Test Articles for Latent Defects.—A dealer purchasing an article of commerce from a manu-

facturer is under no obligation to test articles packed or manufactured by others for the purpose of discovering latent dangers or defects.—Craig v. Baker & Holmes Co., Fla., 96 So., 93.

33.——Degree of Care by Manufacturer.—A manufacturer is held to a higher degree of care than a dealer in putting dangerous compounds upon the market. A manufacturer knows the ingredients of his compound, but a dealer, who occupies the same position practically as a retailer, is not presumed to know the formula by which the article is made, or whether it is inherently dangerous.—Craig v. Baker & Holmes Co., Fla., 96 So., 93.

34.——Duty of Manufacturer to Operate Plant With Great Care.—That high explosives have become a commercial necessity, and their manufacture a legitimate business, does not relieve a manufacturer of the duty to exercise proper care, commensurate with the dangerous character of the business, in the operation of its plant, and does not absolve it from liability for failure to do so, nor from application of the doctrine of res ipsa loquitur, where it would otherwise be applicable.—Atlas Powder Co. v. Benson, U. S. C. C. A., 287 Fed., 797.

35. **False Imprisonment**—Action Against Corporation.—In an action against a corporation for false imprisonment, plaintiff need not prove that defendant or its officers ordered his arrest, but need only show that they instigated it.—Wright v. Automobile Gasoline Co., Mo., 250 S. W., 368.

36. **Insurance**—Bold-Face Type.—The policy provided that there should be a reduced indemnity if the insured was injured while doing an act not pertaining to the occupation stated in the policy but to one classified by the company as more hazardous, This provision was not printed in bold-face type and with greater prominence than other portions of the policy, as required by § 3523, Gen. St. 1913, and hence no effect can be given to it. The policy must be read as though it did not contain the provision at all.—Thorne v. Aetna Life Ins. Co. Minn., 193 N. W., 463.

37.——Certificate Guaranteeing Title.—A certificate by a title insurance and trust company, stating that after examination of the records in relation to the title to certain real property the company "hereby guarantees" that the title to such property as it appeared from the records was vested in a certain party, held to constitute a contract upon which liability would accrue on discovery of loss incurred if the title was not as represented in view of Code Civ. Proc. § 339, as amended by St. 1917, p. 299, declaring that the cause of action upon a contract, obligation, or liability evidenced by a certificate, or abstract, or guaranty title of real property, does not accrue until discovery of the loss or damage.—Title Ins. & Trust Co. v. City of Los Angeles, Calif., 214 Pac., 667.

38.——Forcible Entry.—Where a burglary policy insuring generally against abstraction from safes provided that, in the event the safes were not locked by time lock, the insurer should not be liable for loss of money and securities feloniously abstracted therefrom, unless forcible entry was made therein by the use of tools or explosives directly applied thereon, and only for loss by damage to office furniture and fixtures caused by persons while making or attempting to make such entry into said premises, no recovery for damage to office furniture and fixtures can be had where entry was by the use of a key in the hands of an employee who knew the combination to the book vault, there being no forcible entry, and within the terms of the policy.—Citizens' Nat. Bank v. Union Indemnity Co., Ark., 250 S. W., 329.

39.——Misrepresentation of Previous Sickness.—Where the application for a life insurance policy is made a part of a contract of insurance, and the applicant has therein stated that his answers to the questions were true and are material to the risk, and therein states that he has neither consulted nor been treated by a physician for any ailment or disease within the last five years, and where the testimony shows that ten days previous to the application for insurance he called a physician to prescribe for him, at which time he was sick either with influenza or some other disease, and from which illness he never completely recovered, this was a misrepresentation of the material fact, for which the insurance company is entitled to the cancellation of the insurance contract.—Williams v. N. Y. Life Ins. Co., Miss., 96 So., 97.

40. **Master and Servant**—Truck Owner Independent Contractor.—Truck owner who was engaged in the general business of hauling, and who delivered coal for coal dealer for specified price per ton, without being steadily engaged in such service, and without receiving from dealer special directions as to how the coal was to be delivered, held an independent contractor, and not an employee of the coal dealer.—Svoboda v. Western Fuel Co., Iowa, 193 N. W., 406.

41. **Municipal Corporations**—Child Suddenly Darts In Front of Car.—An automobile driver, though required to be vigilant, is not bound to anticipate that a child will suddenly dart in front of his car.—McAvoy v. Kromer, Pa., 120 Atl., 762.

42.——Operating Automobile at Night.—Though the rule making it negligence as matter of law to operate an automobile at night at such speed that it cannot be stopped within the distance that the highway is illuminated by its lights has never been adopted, it cannot be said that it is no negligence whatever for a driver of an automobile to travel at a speed of 20 miles an hour with his lights so dim that he is unable to see more than 10 feet in advance of his headlights, and when he cannot stop within 20 or 25 feet, and particularly where the evidence shows that he did not in fact stop for 50 or 60 feet.—Burgesser v. Bullock's, Calif., 214 Pac. 649.

43. **Negligence**—Fence and Warning Signs Negative Attractive Nuisance.—In an action for the death of an 11-year-old boy drowned in a millpond covered by floating logs on which children were tempted to play, evidence that the mill and lumber yards adjoining it were fenced, that danger signs warning every one to keep off the logs were located at various places near the pond, and that a part of the pond was not and could not be fenced because of the proximity of a railroad right of way, held not to establish negligence in creating an attractive nuisance.—Smith v. McGoldrick Lumber Co., Wash., 214 Pac., 819.

44. **Principal and Agent**—Words and Not Punctuation Prevail.—A contract making plaintiff sole selling agent for five years provided that "at the expiration of such time said agreement may be extended for an additional five years. * * * Further like five-year extensions may be made at the option of either party upon like notice, provided, however, that if * * * the yearly sales by" defendant to plaintiff "shall be less than" $150,000 defendant "may * * * terminate this agreement." Held that, under the rule that the words and not the punctuation of a contract control the meaning the fact that the proviso clause was separated from the antecedent clause by a comma and commenced with a small "p" did not make the proviso applicable only to the antecedent clause but the proviso permitted a termination in any year during the first five-year period, as well as during the renewal period.—Reliance-Grant E. E. Corp. v. Reliance, Etc., Co., N. Y., 199 N. Y. S., 476.

45. **Railroads**—Absence of Signals at Railroad Crossing.—The absence of statutory signals at a crossing will not justify a traveler in failing to use ordinary care to avoid collision on the crossing, but he is justified in assuming the railway company will make an effort to comply with the law, and his reliance on signals may be considered as bearing on the question of his negligence.—Alitz v. Minneapolis & St. L. R. Co., Iowa, 193 N. W., 423.

46.——Obstructing View of Approaching Train.—Where standing box cars reached from crossing to freight depot 100 feet distant leaving only small opening through which to see approaching train, backing of train of flat cars 1,200 feet long over the crossing held negligence, especially where there was no warning except locomotive signal.—Nash v. Louisiana Ry. & Nav. Co., La., 96 So., 14.

47.——Service On Ticket Agent.—Service of summons on ticket agent of a railroad company at a time when the railroad was under the control of, and was being operated by, the Director General of Railroads, held a good service on Agent appointed by the President of the United States in substitution for the Director General under Transportation Act. Cong. Feb. 28, 1920.—Wright v. Davis, N. C., 117 S. E., 347.

48. Sales—Making New Contract Does Not Breach Original Contract.—Under contract whereby defendant agreed to erect a mill and deliver to plaintiff for a term of years its output of paper board, on a cost plus basis, held, that defendant's announcement that, for three months beyond the time for which it had a valid excuse, it would be impossible to commence deliveries (it having agreed to make deliveries in the meantime from another mill), was not such a material breach as to authorize plaintiff, under St. 1921, § 1684t—45, subd. 2, to refuse to proceed further, and to sue for breach of the entire contract.—Kieckhefer Box Co., v. John Strange Paper Co., Wis., 193 N. W., 487.

49. Taxation—Income Tax On Mortgage Revenue.—Recording Tax Law N. Y. § 251, providing that all mortgages of real property taxed by that article, and the debts and obligations they secure, shall be exempt from other taxation by the state and local subdivisions, did not establish a contract exempting from the tax, which was impaired by the subsequent taxation of income from the mortgage, in view of the fact that at the time the law was enacted the only state taxes on mortgage debts were taxes on the principal, and no one thought of an income tax.—People v. Law, U. S. S. C., 43 Sup. Ct., 501.

50. United States—Interest Charges Against Surety.—Code, § 1184, regulating allowance of interest on liquidated debts, and § 1185, regulating allowance of interest on damages for breach of contract, do not charge the surety of the government contractor with interest on claims of materialmen before demand is made by the materialmen on the surety.—London & Lancashire Indemnity Co. v. Smoot, U. S. C. C. A., 287 Fed., 952.

51.——Officer, Receiving or Agreeing to Receive Compensation.—Under Penal Code, § 113 (Comp. St. § 10283), making it an offense for an officer to receive or agree to receive compensation for service relating to a claim to which the United States is a party, receiving and agreeing to receive the forbidden compensation are separate offenses.—Egan v. United States, U. S. C. C. A., 287 Fed., 958.

52. Witnesses—Officer of Corporation Must Produce Books.—The officer of a corporation cannot refuse to produce the books and papers of the corporation which he holds, not as an individual, but as a corporate officer, on the ground that the production thereof would tend to incriminate the officer.—Essgee Co. of China v. United States, U. S. S. C., 43 Sup. Ct., 514.

53. Workmen's Compensation Act—Altercation Arising Out of Contention for Use of Tools Within Course of Employment.—Where an employee, while engaged in his work with his master's tools provided for that purpose was assaulted and fatally injured by another employee during an altercation which arose out of a contention for the use of the tools, deceased merely defending himself and retaining the tools for use in finishing his work, and there was no personal grudge between them, held, the altercation not being a personal one, but growing out of matters connected with deceased's work, the injury was received "in the course of his employment" within the terms of Workmen's Compensation Act, pt. 1, § 1 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—1) as defined by part 4, § 1, subd. 4 (article 5246—82, subd. 4); the expression "in the course of his employment" having reference to the time, place, and circumstances under which the injury occured.—Consolidated Underwriters v. Saxon, Tex., 250 S. W., 447.

54.——Assault By Striker Not in Course of Employment.—Injuries to a department head, who continued to work during a strike of the employees, and who was assaulted by a striker on his way to work held not to have arisen in the "course of the employment" within the Workmen's Compensation Law.—Lampert v. Siemons, N. Y., 139 N. E., 278.

55.——Injury, During Noon Hour, in Fellow Employee's Automobile Not in Course of or Arising Out of Employment.—An employee of the Highway Commission, injured during noon hour while riding in a defective automobile belonging to a fellow employee from the place of employment to a camp maintained by the employer about two miles' distant, where he intended to purchase his dinner, held not to have sustained an "injury in the course of and arising out of his employment," within the Workmen's Compensation, Insurance and Safety Act; nor would the employer's failure to furnish transportation be creative of any liability for risks connected with the means adopted, though it was a custom for the employees to ride employer's truck to and from camp.—California Highway Com. v. Industrial Accident Com., Calif., 214 Pac., 658.

56.——Injury During Working Hours Not in Course of Employment.—Where an employee, having the option to ride to work on a trolley or in employer's bus on paying fare, was injured by an accident occurring after the regular work hours had commenced, while the bus was delayed for repairs during the journey, and he was paid for a full day, as he had been on other occasions when the bus was late, the injury did not arise in the "course of employment," within the Workmen's Compensation Law.—Stimal v. Jewett & Co., N. Y., 199 N. Y. S., 473.

57.——Injury Lighting Cigar Not in Course of Employment.—Where apprentice painter, while sandpapering the walls of an unoccupied dwelling which his employer was renovating under contract, lost his eyesight by explosion of dynamite caps which in some unknown manner had been placed on a window sill of the room, and which were caused to explode by coming in contact with a spark from a match with which the painter lit a cigar, held, that the injury did not arise out of, nor was it proximately caused by, the employment.—Storm v. Industrial Accident Commission, Calif., 214 Pac., 874.

58.——Interlocutory Divorce Judgment Awarding Custody of Infant Child to Mother No Bar to Compensation.—The mere fact that an interlocutory divorce judgment awarded the custody of an infant child to the mother, and that the mother thereafter for some time supported the child, did not preclude the child from recovering compensation for death of the father as a dependent of the father, under Workmen's Compensation Act, § 14 (b), in view of failure of final decree to award custody to mother, and facts showing that at the time of his death the father was in fact supporting the child.—Llewellyn Iron Works v. Industrial Acc. Commission, Calif., 214 Pac., 846.

59.——Judgment Will Not Be Reversed When Release Was Executed By Mistake.—Where a workman for a packing company, while engaged in the performance of his duties, lifted a 600-pound barrel, sustained a hernia, was treated and operated upon by the company's surgeon, and where a "milk leg" developed two weeks after the operation while the workman was still in the hospital, and where a release relieving the company of all liability was executed for a grossly inadequate consideration, both parties believing the injury temporary, and where it was afterwards found that the workman would be partially incapacitated for a long period of time, held, that a judgment supported by findings of the jury that the release was executed by mutual mistake and for a grossly inadequate consideration will not be reversed.—Bidnick v. Armour & Co., Kan., 214 Pac., 808.

60.——One Who Assists Employee Not Entitled to Compensation.—One who assists an employee for a few minutes at his request, without expecting pay therefor, and without the knowledge of the employer, is not entitled to compensation from the employer for injuries, as he was not an "employee" within the definition of the Compensation Act.—State v. Industrial Commission, Minn., 193 N. W., 450.

61.——Person Employed By Corporation During Club Season Was Engaged in Usual Course of Trade.—When a corporation, whose business was the building, furnishing and maintaining a clubhouse, and all necessary and suitable ground for the promotion and encouragement of outdoor sports, and to provide entertainment, instruction and profit for its members and stockholders, employs a person for a certain period at a fixed sum per hour to care for said grounds, repair the buildings, and prepare and maintain the grounds for outdoor sports, under the direction and supervision of the officers of such corporation during the club season, held, such employment was not casual and such employee was engaged in the usual course of the trade and business of such corporation.—Dietz Club v. Niehaus, Neb., 193 N. W., 344.